Khairul Anwar bin Abd Aziz & Anor v Pakiam a/p Vitilingam (as the beneficiary and the mother to Vanarajan a/l Arjunan, deceased) & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12–115 OF 2005
HO MOOI CHING JC
31 AUGUST 2009

Tort — Negligence — Road accident — Causation — Whether proven on balance of probabilities that death resulted from injuries sustained in accident

Tort — Negligence — Road accident — Fatal accident — Dependency claim — Dependants — Proof based on deceased's birth certificate that claimant was mother — Whether customary marriage proven by wedding photograph, statutory declaration and birth certificate of child — Whether necessary for dependants to take out letters of administration or grant of probate before commencing dependency claim — Civil Law Act 1956 s 7(8)

Tort — Road accident — Contributory negligence — Apportionment of liability — Bus collided into motorvan — Sessions court apportioned liability at 50:50 — Appeal against apportionment — Whether appeal should be allowed

A collision occurred between a van driven by the deceased and a bus driven by the first appellant and owned by the second appellant. The accident occurred at the intersection of Lorong Kangkong 3, a minor road and Jalan Taman Kangkong, a major road. The deceased had approached Lorong Kangkong 3 to turn left to Butterworth. The respondents' bus came from the direction of Butterworth. The deceased had a duty to stop at the junction before emerging into the main road. The first respondent (SP6) (mother of the deceased) and the second respondent (SP7) (his widow) sued for loss of support. Based on 50% liability, the sessions court awarded each respondent, inter alia, RM28,800 as loss of support. All the parties appealed on both liability and quantum. The appellants claimed that the learned sessions court judge was wrong in finding contributory negligence after finding that the deceased had emerged from a minor road onto a major one without stopping and without ascertaining that it was safe to do so although there was nothing to obstruct his vision of approaching traffic on the main road. Issue was also raised as to: (i) whether the first respondent was the mother of the deceased; (ii) whether SP7 was the wife of the deceased. No marriage certificate was

A produced by SP7; and (iii) whether the deceased died as a result of the accident.

B **Held**, dismissing the appeal on liability and allowing the appeal as to quantum to the extent of setting aside the award for loss of services to the first respondent:

(1) The court's finding of contributory negligence was based on the finding that as the first appellant intended to turn to his right, he should only have remained in his lane until he came to the junction before turning when it was safe to do so. The location of most of the debris supported the inference that the bus had started making the turn and encroaching into the opposite side of the road even before arriving at the junction (see para 6).

(2) The court was also entitled to take into account the first appellant's plea of guilt to a charge of careless driving arising out of the accident. If the deceased had a clear view of the main road, the same could be said of the first appellant who could have avoided the accident if it had kept to his lane until it was safe to turn. The trial court had not erred in finding the deceased and the defendants equally liable (see para 6).

(3) The trial court was entitled to accept based on the birth certificate of the deceased that the first respondent was his mother. By virtue of the circumstances set out in s 7(8) of the Civil Law Act 1956, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executors. It was not incumbent on SP6 to take out letters of administration or a grant of probate before commencing this action (see para 7).

(4) There had been a customary marriage supported by the evidence of a wedding photograph, a statutory declaration confirming that there was such a marriage and the birth certificate of her child which named the deceased as the father (see para 8).

(5) There was evidence that the deceased was admitted to Kulim Hospital and subsequently transferred to Sungai Petani Hospital for further treatment. He died the day after the accident. It was proved on a balance of probabilities that death resulted from the injuries sustained from the accident (see para 10).

(6) The award of loss of support for SP6 and SP7 (based on 50% liability), though on the generous side, was not so manifestly excessive as to warrant interference. The award for loss of services was set aside. The

fact that the appellate court might have awarded a lower sum had it been sitting as the trial court is no reason for interference (see paras 11–12).

[Bahasa Malaysia summary

Perlanggaran telah berlaku antara van yang dipandu oleh si mati dan bas yang dipandu oleh perayu pertama dan dimiliki oleh perayu kedua. Kemalangan berlaku di persimpangan Lorong Kangkong 3, jalan kecil dan Jalan Taman Kangkong, jalan utama. Si mati telah memandu ke arah Lorong Kangkong 3 untuk membelok ke kiri untuk ke Butterworth. Bas responden tiba dari arah Butterworth. Si mati mempunyai kewajipan untuk berhenti di simpang tersebut sebelum keluar ke jalan utama. Responden pertama (SP6) (ibu si mati) dan responden kedua (SP7) (balunya) telah menyaman untuk kehilangan sara hidup. Berdasarkan liabiliti 50%, mahkamah sesyen telah mengawardkan setiap responden, antara lain, RM28,800 sebagai kehilangan sara hidup. Kesemua pihak telah merayu ke atas kedua-dua liabiliti dan kuantum. Perayu-perayu mendakwa bahawa hakim mahkamah sesyen khilaf dalam penemuan kecuaian sertaan setelah mendapati bahawa si mati muncul dari jalan kecil ke jalan utama tanpa berhenti dan tanpa memastikan bahawa ia selamat untuk berbuat demikian walaupun tiada apa-apa yang menghalang penglihatannya ke arah lalu lintas atas jalan utama. Juga ditimbulkan isu tentang: (i) sama ada responden pertama adalah ibu kepada si mati; (ii) sama ada SP7 adalah isteri si mati. Tiada sijil perkahwinan dikemukakan oleh SP7; dan (iii) sama ada si mati meninggal dunia akibat daripada kemalangan itu.

Diputuskan, menolak rayuan atas liabiliti dan membenarkan rayuan atas kuantum setakat mengetepikan award untuk kehilangan khidmat yang diberikan kepada responden pertama:

(1) Penemuan kecuaian sertaan oleh mahkamah adalah berdasarkan penemuan bahawa memandangkan perayu pertama telah berniat untuk membelok ke kanannya, dia harus kekal di lorongnya sehingga dia tiba ke simpang tersebut sebelum membelok setelah selamat berbuat demikian. Lokasi kebanyakan serpihan menyokong inferens bahawa bas tersebut telah mula membelok dan memasuki jalan ke arah yang bertentangan sebelum tiba ke simpang itu lagi (lihat perenggan 6).

(2) Mahkamah juga berhak mengambilkira pengakuan bersalah perayu pertama terhadap pertuduhan memandu dengan cuai yang berbangkit daripada kemalangan tersebut. Jika si mati mempunyai pandangan jelas ke jalan utama, yang sama boleh dikatakan tentang perayu pertama yang mungkin boleh mengelakkan kemalangan itu jika ia kekal di lorongnya sehingga ia selamat untuk membelok. Mahkamah bicara

A tidak khilaf dalam memutuskan si mati dan defendan sama-sama bertanggungjawab (lihat perenggan 6).

(3) Mahkamah bicara berhak memutuskan, berdasarkan sijil kelahiran si mati bahawa responden pertama adalah ibunya. Menurut keadaan yang
B ditetapkan dalam s 7(8) Akta Undang-Undang Sivil 1956, tindakan boleh dimulakan oleh semua atau mana-mana orang, jika lebih daripada satu, jika dia mendapat faedah daripada tindakan tersebut, jika ia telah dimulakan oleh wasi. SP6 tidak wajib mengeluarkan surat kuasa mentadbir atau memberikan probet sebelum memulakan tindakan ini
C (lihat perenggan 7).

(4) Terdapat perkahwinan ikut adat yang disokong dengan bukti gambar perkahwinan, satu deklarasi statutori mengesahkan kewujudan perkahwinan tersebut dan sijil kelahiran anaknya yang menamakan si
D mati sebagai bapanya (lihat perenggan 8).

(5) Terdapat keterangan bahawa si mati telah dimasukkan ke Hospital Kulim dan kemudian dipindahkan ke Hospital Sungai Petani untuk rawatan susulan. Dia telah meninggal dunia sehari selepas kemalangan tersebut. Telah dibuktikan atas imbangan kebarangkalian bahawa
E kematian tersebut akibat daripada kecederaan yang dialami daripada kemalangan tersebut (lihat perenggan 10).

(6) Award untuk kehilangan sokongan untuk SP6 dan SP7 (berdasarkan 50% liabiliti), bukan secara jelas berlebihan untuk membolehkan
F campur tangan. Award untuk kehilangan khidmat diketepikan. Fakta bahawa mahkamah rayuan mungkin mengawardkan jumlah yang lebih rendah dan bersidang sebagai mahkamah perbicaraan bukanlah alasan untuk campur tangan (lihat perenggan 11–12).]

G **Notes**

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1664–1665.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1258–1500.

H **Cases referred to**

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 AMR 3744, SC (refd)

I *Joremi bin Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268; [2001] 1 CLJ 526, CA (refd)

Legislation referred to

Civil Law Act 1956 s 7(8)

Mohamed Aslam bin Mohamed Mydin (Presgrave & Matthews) for the appellants.
Baldev Singh Bhar (Baldev Bhar) (Kuppusamy a/l Sinnasamy and Mohd Fadzil bin Mohd Khalil with him) (Kuppusamy Fadzil & Co) for the respondents.

Ho Mooi Ching JC:

[1] At about 7.30am on 27 September 1997 there was a collision between van No KAA 1861 driven by Vanarajan a/l Arjunan ('the deceased') and bus No PCQ 4774 driven by the first appellant and owned by the second appellant. Both Packiam a/p Vitilingam (the plaintiff in 53–49 of 1999 and also the first respondent in the appeal from the sessions court, in the capacity of mother of the deceased) and Sasi a/p Nadeson (the plaintiff in 53–110 of 2000 and also the second respondent in the appeal from the sessions court, in the capacity of his widow) sued for loss of support. Both cases were consolidated and after a hearing, the sessions court found the deceased and the appellants equally liable for the accident.

[2] Based on 50% liability, the sessions court awarded each respondent RM28,800 as loss of support. Although the trial court specifically ordered that there was no interest awarded on loss of support (see pp 252–253 and 320 of the appeal record in 12–93 of 2005), the order was erroneously extracted to show that the award for loss of support carries interest at the rate of 8%pa from the date of service of the summons to the date of realisation. The first respondent was also awarded RM1,000 for funeral expenses and loss of services amounting to RM1,920 with interest thereon at the rate of 4% from 27 September 1997 till the date of judgment. The sessions court's award satisfied no one and all the parties involved appealed on both liability and quantum to this court resulting in three appeals 12–115 of 2005 being the defendants' appeal; 12–93 of 2005 being the first respondent's (mother) appeal and 12–94 of 2005 being the second respondent's (wife) appeal. On 18 February 2009, after hearing the parties, this court dismissed the appeal on liability and only allowed the appeal as to quantum to the extent of setting aside the award for loss of services handed down to the first respondent. On 1 July 2009, the present appellants appealed against the whole of this court's decision except the setting aside of the award for loss of support.

LIABILITY

[3] There is no dispute that the accident occurred at the intersection of Lorong Kangkong 3, a minor road and Jalan Taman Kangkong, a major road. The deceased had approached Lorong Kangkong 3 to turn left to Butterworth. The respondents' bus came from the direction of Butterworth.

A It is not disputed that the deceased had a duty to stop at the junction before emerging into the main road. The second respondent (SP7) testified that she was in the passenger seat at the time of the accident and the deceased had stopped at the junction before turning into the main road when the defendants' bus which was approaching from the opposite direction B encroached into the van's side of the road and collided into it. It was never mentioned in the deceased's police report that he had a passenger in the van and the investigating officer SP9 said that he found 'daripada percakapan tiada penumpang motovan'. He did not say whose statement he relied on and whether there was a positive assertion that there was no passenger in the van C or merely no mention that there was a passenger. I find SP9's evidence on this issue vague and clearly hearsay. The deceased had not mentioned that he had a passenger in his report, which in any case, was never marked as an exhibit. SP7 had not lodged any report as she explained that the deceased had done so. The trial court made no finding as to the presence of SP7 during the D accident and did not rely on SP7's evidence in coming to a finding on liability. The appellants complained in para 6 of the memorandum of appeal that the court was wrong when it failed to view SP7's evidence with suspicion. I found this ground of appeal totally unjustified as the trial court made no reference to her evidence at all and this actually formed a ground of appeal E by SP7. In fact, she found that the deceased had emerged from the junction 'dengan melulu' which means she discounted SP7's evidence that the deceased had stopped at the junction.

F **[4]** Apart from her insistence that the deceased had stopped at the junction before emerging into the main road and that the collision happened on his side of the road, SP7 did not have a clue as to whether the bus had shown any signal to turn right. It is reasonable to conclude that she was not paying any great attention to the traffic situation at the relevant time. Even if it is accepted that the deceased had stopped at the junction, he had emerged from G it before it was safe to do so. The trial court concluded that the collision had occurred at 'N' where glass splinters said to have come from the windscreen of the van were found. However, more of the splinters were in lane BC in the sketch plan according to the evidence of SP2, who said he went to the scene at around 3.30pm on the day of the accident. This was contradicted by the H photographer SP3 who said he went to the scene with SP2 at around 7.30am on the same day, which would be almost immediately after the accident. According to SP2, most of the debris was scattered right to the junction as shown in photograph P5D and not as it appears in the sketch plan. In view of the evidence, the court's finding that the collision was in lane BC was I reasonable. From the position of the van after the accident, it is clear that the van had not fully emerged from the junction.

[5] The first appellant did not appear in court and the court allowed the admission of his police report (exh D14) as there was some evidence from SD1, the adjuster that efforts to trace him were unsuccessful. Nevertheless, the trial court specifically stated that it did not rely on evidence from either the deceased or the first appellant but only on the silent evidence such as the sketch plan, debris from the collision, damage to the vehicles and the evidence of the investigating officer in determining liability. D14 was included in Part 1 of the agreed bundle and by reason of the fact that it was referred to in submissions, it became part of the defence case and it was for the court to determine the weight to be attached to it (see *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 AMR 3744). Although no reference was made to D14 in the judgment of the trial court, it appears that it was taken into account since the court accepted that the first appellant had intended to turn right. However, it must not be forgotten that D14 was not tested by cross-examination and thus, of limited value. The appellants' complaints against the finding on liability are set out in para 5 of the memorandum of appeal. Shortly stated, the complaints are that the learned sessions judge was wrong in finding contributory negligence after finding that the deceased had emerged from a minor road onto a major one without stopping and without ascertaining that it was safe to do so although there was nothing to obstruct his vision of approaching traffic on the main road.

[6] The court's finding of contributory negligence was based on the finding that as the first appellant intended to turn to his right, he should only have remained in his lane until he came to the junction before turning when it was safe to do so. It was not unreasonable to accept that as most of the debris of the accident was found in the lane BC, the point of impact was probably in that lane. Moreover, the location of most of the debris in lane BC before the middle of the junction and the position of the bus at an oblique angle to the side of the road B, support the inference that the bus had started making the turn and encroaching into the opposite side of the road even before arriving at the junction. In view, of the position of the glass splinters, it is not unreasonable to presume that the bus had been moved back to its resting place as indicated in the sketch plan. The court was also entitled to take into account the first appellant's plea of guilt to a charge of careless driving arising out of this accident. If the deceased had a clear view of the main road, the same could be said of the first appellant who could have avoided the accident if it had kept to lane CD until it was safe to turn. In the circumstances of the case, I find that the trial court had not erred in finding the deceased and the defendants equally liable.

Whether the first respondent was the mother of the deceased

[7] The trial court was entitled to accept based on the birth certificate of

A the deceased (exh P13) that the first respondent was his mother. P13 was marked as an exhibit without objection from the defence and must be taken as unchallenged. It was not, however, included in the appeal record. By virtue of the circumstances set out in s 7(8) of the Civil Law Act 1956, the action may be brought by all or any of the persons, if more than one, for whose B benefit the action would have been brought if it had been brought by the executors. It was not incumbent on SP6 to take out letters of administration or a grant of probate before commencing this action.

Whether SP7 was the wife of the deceased

C

[8] No marriage certificate was produced by SP7 although she claimed that a priest conducted the marriage ceremony between her and the deceased on 6 February 2007. Her evidence was contradicted by SP6 who said that it was D her husband Arjunan who conducted the marriage although he was not authorised to do so. Nevertheless, both SP6 and SP7 accepted that there had been a customary marriage, though not necessarily one that is valid under any law relating to marriage and divorce. The trial court accepted the evidence of SP7 and SP6 as to fact that there had been such a marriage supported by the E evidence of a wedding photograph ID10, a statutory declaration confirming that there was such a marriage (P11) and the birth certificate of her child (P12) which names the deceased as the father. Although the photographer who took the photograph ID10 was not called and the photograph was not in evidence, it was open to the learned trial judge to come to the conclusion F that she did based on the totality of the evidence before her. In *Joremi bin Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268; [2001] 1 CLJ 526, Haidar Mohd Noor JCA (as he then was) held that:

> In my opinion, I do not think that the word 'wife' found in s 7(2) of the Civil Law G Act should be restricted to a woman whose marriage has been solemnised and registered pursuant to the provisions of any prevailing Act relating to marriage and divorce. The Married Women Act 1957 provides that a 'married woman' includes any woman who has undergone a customary marriage — to me, such a 'married woman' would fall within the contemplation of the word 'wife' as found in s 7(2) of the Civil Law Act and the Act also provides that she shall be capable of suing H in tort and shall be entitled to all remedies and redress for all purposes.

I think the abovementioned authority applicable to this case and saw no reason to upset the trial court's finding on this point.

I *Whether the deceased died as a result of the accident*

[9] It was argued by the defence that there was no proof that the deceased died as a consequence of the accident. The medical report from Kulim Hospital was only tendered as ID6 as the doctor who issued it was not called

and only the post-mortem report was tendered as P1. The cause of death was 'motor vehicle accident with septicaemic shock secondary to duodenal rupture'. The medical report of Dr Alias who first treated the deceased at Kulim Hospital was not produced as the doctor was not called. The deceased was transferred to Hospital Sungai Petani from Kulim Hospital on 28 September 1997 and according to SP1, he was still alive on admission to that hospital. There was evidence from SP7 that an Indian doctor in Kulim Hospital told her that, by mistake, the right side of the abdomen had been repaired instead of the left. The defence submitted that the court should have inferred that one Dr Ananthakumar, a surgeon from India then under contract at Kulim Hospital was responsible for this. I agree with the trial court that the evidence of SP7 on this issue cannot be accepted. There is no evidence as to the identity of the person who gave her this information or any evidence as to the truth of the matter. On the one hand, the court is asked to ignore the contents of ID6, on the other hand the court is asked to take note that it was Dr Ananthakumar who operated on the deceased. There is no evidence apart from ID6 as to the surgeon who operated on the deceased. The evidence of SP8, the director of Kulim Hospital is only to the effect that there was such a surgeon attached to that hospital at that time and he had no knowledge of the management of the deceased as a patient in the hospital.

[10] There is evidence that the deceased was admitted to Kulim Hospital and subsequently transferred to Sungai Petani Hospital for further treatment. He died the day after the accident. SP1 was not challenged as to the cause of death. I agree with the trial court that it was proved on a balance of probabilities that the death resulted from the injuries sustained from the accident.

Loss of support for SP6

[11] Based on the evidence of the employer, the trial court found that the deceased was employed as a welder earning RM45 a day for 23–26 days a month or RM1100–1200 a month, although there was no documentation from the EPF or SOCSO. SP6 testified that the deceased gave her RM650 a month out of which she paid for utilities, rent of RM300 a month and groceries. She also used RM100 a month to buy milk for the deceased's child, which does not count as loss of support for SP6. The court awarded loss of support of RM300 per month for 16 years as the deceased was only 20 years at the time of his death. While I would agree that the award of RM28,800 (based on 50% liability) is on the generous side, it was not so manifestly excessive as to warrant interference. I set aside the award for loss of services which is not the subject matter of this appeal.

Loss of support for SP7

[12] According to SP7, the deceased was working as a welder. For two

weeks before his death, he was also working as a driver ferrying factory workers to and from work. SP7 said that the van that was involved in the accident belonged to the deceased although no proof of ownership was produced. She did not know how much he made from driving the van or how much he had to pay by way of instalments for the van. She only knew that he gave her RM550 a month which she used for the needs of her child as well as to buy clothes for herself. She denied a suggestion from the defence that if at all the deceased gave her any money, it was only RM150 a month. The learned sessions judge also awarded a sum of RM300 a month using a multiplier of 16 years bearing in mind that the deceased had a young child to provide for. She rejected the evidence that the deceased earned an income from driving the van as there was no proof of such earnings. In the circumstances, the award though generous was not manifestly excessive and did not warrant interference. It is trite law that the fact that this court might have awarded a lower sum had it been sitting as the trial court is no reason for interference.

[13] The appeal was dismissed with costs except as stated, for the grounds set out above.

Appeal dismissed on liability and the appeal allowed as to quantum to the extent of setting aside the award for loss of services to the first respondent.

Reported by Kanesh Sundrum